[redacted]

SALVE REGINA COLLEGE,

Petitioner,

v.

SHARON L. RUSSELL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR RESPONDENT ON MERITS

Bernard T. Hinson, Esq.*
Thomas S. Hinson, Esq.
Hinson & Hinson
201 Waterman Avenue
East Providence, R.I. 02914
(401) 438-7888
Counsel for Respondent
*Counsel of Record

[redacted]

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

No. 89-1629

In The

Supreme Court of the United States

October Term, 1990

SALVE REGINA COLLEGE,

Petitioner,

v.

SHARON L. RUSSELL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR RESPONDENT ON MERITS

STATEMENT OF THE CASE

The facts of the case are set forth in the Petitioner's Petition for Writ of Certiorari filed April 16, 1990; in the Respondent's Brief in Opposition filed on or before June 8, 1990; and in the Joint Statement of the Parties filed in the District Court February 13, 1987 (J.A. 65-81).

On June 28, 1990, this Court granted the Petition for Certiorari " . . . limited to Question 1 presented by the petition.", which reads:

"1. Whether a party is entitled to a *de novo* review of a federal district judge's determination of state law in a case in which federal jurisdiction is founded upon diversity of citizenship?"

Since the question poses a legal issue only, further reference to the facts is unnecessary.

PROLOGUE

The petitioner in its Petition for Writ of Certiorari, and again in its Brief on the Merits, misstates what the district court held when it ruled the doctrine of substantial performance applicable to the case at bar. As we have said in our Brief in Opposition, we recognize that the question of whether the doctrine is correctly applied is not technically before this Court. But for the petitioner's insistence in raising it again in its Brief on the Merits, we would not address the issue at this point. That repetition by the petitioner does, we feel, require some response, however brief. In this regard, we refer the Court to pages 7 through 12 of our Brief in Opposition which we set out as Appendix A hereto. All of the cases cited by the petitioner in footnote 6 on page 16 of its Brief on the Merits are distinguished by us from the case at bar in said Appendix A hereto. As we have said before, this is not a case of student versus academia. Here the relationship between the parties was and is unique. The district court, in recognizing this factor and applying the doctrine of substantial performance did not make a prediction that the Rhode Island Supreme Court would rule that a student's substantial – although not full – performance in

meeting the requirements for continuing or completing an academic program is sufficient. The District Court did not rule that a jury should be permitted to conclude that a student who substantially performed the academic standards would be entitled to a degree; nor did it rule that anyone should be treated by a nurse who substantially performed but did not fully meet the requirements for graduation. What the district court did hold and rule is succinctly stated in Appendix A to our Brief in Opposition. What the circuit court had to say about the issue is set forth in Appendix B to that Brief. At this juncture we respectfully refer the Court to those comments and for the convenience of the reader set them out again as Appendices B and C respectively hereto.

SUMMARY

The alleged conflict between the various Circuit Courts of Appeal as to the appropriate appellate review standard to be applied in passing upon a district judge's holding as to an unsettled state law question in diversity cases is more imaginary than real; founded upon the mistaken notion that those circuits which espouse the "deferential" rule adopt the lower court's ruling blindly and without study or thought. In practice, the "deferential" circuits do give a full and meaningful review of the law questions involved and only when satisfied that the district judge was correct do they hold him "not clearly wrong" or "not guilty of reversible error".

The ever increasing volume of pending cases in all circuits mandates that those courts conserve their judicial

manpower and expend it in a fashion designed to bring about the most effective use thereof, in that field of law, i.e., federal cases, where they have not only superior expertise, but are also vested with superior judicial power by Congress. Diversity cases, involving state law questions, do not fall within the scope of the circuit court's expertise, nor does plenary review of such state law questions, by way of lengthy and time-consuming opinions that merely affirm the district judge's ruling, do much to advance the *Erie* goals of discouraging forum-shopping and uniformity, nor conserve precious judicial time and energy for use in more pressing federal policy cases. The long standing "deferential" rule of review, which is in reality nothing more than judicial shorthand for an opinion which affirms the district judge's holding on an unsettled state-law question, does both. The inherent and fundamental differences in the nature of issues presented in diversity cases from those which permeate federal cases, as well as the differences in those courts' authority in construing the law in those distinctly distinguishable cases, militate against the concept of requiring detailed judicial opinion writing in every diversity case.

ARGUMENT

I. Prior to *Matter of McLinn*, 739 F.2d 1395 (9th Cir. 1984) (en banc) Circuit Courts of Appeal recognized the "predictive" nature of a federal district court's determination of what a state supreme court might at a later date hold state law to be, as to questions unsettled at the time the district court acted.

II. Recognizing this "predictive" element, Circuit Courts of Appeal historically gave deference to a district court's determination, although the standard of deference was expressed in various ways.

III. Matter of *McLinn, supra*, at least on a superficial reading, imports into our jurisprudence a new standard for appellate review of such district court rulings; i.e., a de novo or plenary review with no deference accorded to the lower tribunal's "prediction".

IV. In reality, matter of *McLinn, supra*, states the long prevailing standard actually used by all Circuit Courts of Appeals in different terms. This is a "war of words" and not of substance.

V. If, and to the extent that *McLinn* goes beyond past practice, and precedents set by this Court, it is wrong and unsound.

I. Prior to *Matter of McLinn*, 739 F.2d 1395 (9th Cir. 1984) (en banc) Circuit Courts of Appeal recognized the "predictive" nature of a federal district court's determination of what a state supreme court might at a later date hold state law to be, as to questions unsettled at the time the district court acted.

Beginning with *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), and continuing to the present day, a federal district court, sitting on a case where its jurisdiction is predicated solely upon the diversity of citizenship of the litigants, has been charged with the duty of applying the substantive law of the forum state to all questions of law that come before it. The applicability of state law, settled or unsettled, in diversity cases, as espoused by

Erie, supra, is grounded in the notion of federalism. Mr. Justice Harlan said of the *Erie* doctrine that it is " . . . one of the cornerstones of our federalism."[1]

This task of applying state law, while never easy, is considerably less onerous where the forum state's highest court has addressed the issue, than where there is no binding precedent for the trial court to follow. In such a case of unsettled state law the district judge may not " . . . choose the rule it would adopt for itself; it must choose the rule that it believes the state's highest court, from all that is known about its methods of reaching decisions, is likely to adopt sometime in the future."[2]

The "predictive" nature of this judicial inquiry at the trial level was described by Judge Jerome Frank as "what would be the decision of reasonable, intelligent lawyers, sitting as judges of the highest (state) court, and fully conversant with (the forum state's) jurisprudence?"[3]

Mr. Justice Frankfurter, in his concurring opinion in *Bernhardt v. Polygraphic Co. of America,* 350 U.S. 198, 209 (1950) said that "as long as there is diversity jurisdiction, 'estimates' are necessarily all that federal courts can make in ascertaining what the state court would rule to be its law."

---

[1] *Hanna v. Plumer,* 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

[2] 19 *C. Wright, A. Miller & E. Cooper,* Federal Practice and Procedure (1982) §4507 at 103.

[3] *Cooper v. American Airlines, Inc.,* 149 F.2d 355 (2d Cir. (1945).

One writer has described this predictive function as an " . . . exercise of 'fourth dimensional' reasoning".[4]

II. Recognizing this "predictive" element, Circuit Courts of Appeal historically gave deference to a district court's determination, although the standard of deference was expressed in various ways.

Prior to the Ninth Circuit decision in *Matter of McLinn,* 739 F.2d 1395 (1984), virtually all circuit courts had espoused, in one form or another, the so-called "deferential rule" or standard of review. The Third Circuit, however, appears to have adopted the de novo standard of review of state-law issues in diversity cases.[5]

The "deferential" rule is articulated in various ways but the most common expressions thereof are in terms of "great weight", "substantial deference", or "considerable deference". See, *Foreman v. Exxon Corp.,* 770 F.2d 490 (5th Cir., 1985) ("great weight"); *Goldstick v. ICM Realty,* 788 F.2d 456 (7th Cir. 1986) ("substantial deference"); *Besta v. Beneficial Loan Co. of Iowa,* 855 F.2d 532 (8th Cir. 1988) ("substantial deference"); *Duffy v. Sarault,* 892 F.2d 139 (1st Cir., 1989) ("considerable deference"). There are literally hundreds of cases that voice the rule in one form or another.[6]

---

[4] Woods, *The Erie Enigma: Appellate Review of Conclusions of Law,* 26 Arizona Law Review 755, 759 (1984). The same author has prepared, in manuscript form, a reply to Professor Coenen's article which is found in 73 Minnesota Law Review 899 (1989), which he hopes to publish in the near future.

[5] See, 64 Texas Law Review 156, 158 fns. 10 & 11.

[6] For a detailed analysis of these various expressions, and a compilation of cases on a circuit-by-circuit basis, see 73 Minnesota Law Review 899, 963-1017.

The rationale for the rule, however stated, is simply the circuit court's willingness to recognize the fact that a federal trial judge, sitting in his own state, (usually following a successful career as a practicing lawyer, or trial judge in that state's judiciary, or both), is in a far better position to "divine" or "predict" or "guesstimate" how that state's supreme court will rule on an unsettled question of that state's law, than are three or more of the circuit judges, who bring to the issue no such special expertise or "feel" for a law of the state. This is otherwise stated as follows:

> "The federal courts of appeal have, until *McLinn*, always recognized the intuitive, impressionistic nature of the district judges' task; trial judges who are nurtured in a state's legal system have, more likely than not, a better "predictive feel" for the processes of the state judicial system than appeals courts who bring the cold objectivity of ignorance to the task. Thus, federal courts of appeal have historically accorded special deference to the district courts' determination of state law. If the law is clear and the district court is wrong, there is, of course, clear error. But, if there is room for doubt because of ambiguity or the absence of considered decision making in the state court, the analytic nature of the *Erie* mandate precludes a conclusion of clear error."[7]

The First Circuit, in *Rose v. Nashua Board of Education*, 679 F.2d 279, 281 (1982) said:

> " . . . we are reluctant to interfere with a reasonable construction of state law made by a

---

[7] See, Woods, *The Erie Enigma; etc., supra*, note 4, at pages 759, 760 of 26 Arizona Law Review (1984).

> district judge sitting in the state, who is familiar with that state's law and practices."

This Court has itself dealt with the issue on several occasions. In *United States v. Hohri, et al*, 482 U.S. 69, 107 S.Ct. 2246 (1987) Mr. Justice Powell, in footnote 6 at page 74 of 482 U.S., aware of *In re: McLinn, supra*, for he cites that case in the same footnote, said:

> "Indeed a district judge's determination of a state law question usually is reviewed with great deference."

In *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 204, 76 S.Ct. 273, this court, speaking through Mr. Justice Douglas, stated the rule to be that:

> "Since the federal judge making those findings is from the Vermont Bar, we give special weight to his statement of what the Vermont law is."

Even before *Bernhardt, supra*, this Court had on other occasions dealt with the issue. In *United States v. Durham Lumber Co.*, 362 U.S. 522, 80 S. Ct. 1282, 4 L.Ed. 2nd 1371 (1960), Chief Justice Warren cited and quoted from *Propper v. Clark*, 337 U.S. 472, 486, 487, 93 L.Ed. 1480, 1492, 1493, 69 S.Ct. 1333, the language of Mr. Justice Reed in *Propper, supra*, that where "(t)he precise issue of state law involved . . . is one which has not been decided by the . . . (state) courts . . . we are hesitant to overrule decisions of federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable."

In 19 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure (1982) at §4507, pg. 106, the authors state the rule or rationale for the rule as follows:

> "As a general proposition, a federal court judge who sits in a particular state, especially one who has practiced before its courts, may be better able to resolve complex questions as to the law of that state than is a federal judge who has no such personal acquaintance with the law of the state. For this reason federal appellate courts frequently have voiced reluctance to substitute their own view of the state law for that of the district judge. As a matter of judicial administration, this seems defensible."

See also, *Lindsey v. Normet*, 405 U.S. 56, 83, 92 S. Ct. 862, 879 (1971), (Mr. Justice Douglas, dissenting in part); *MacGregor v. State Mutual Life Assur. Co.*, 315 U.S. 280, 281, 62 S. Ct. 607; *Huddleston v. Dwyer*, 322 U.S. 232, 237, 64 S. Ct. 1015, 1018; *General Box Co. v. U.S.*, 351 U.S. 159, 165, 169, 76 S. Ct. 728, 732, 735; *Magenau v. Aetna Freight Lines*, 360 U.S. 273, 281, n.2, 70 S. Ct. 1184, 1189 (Mr. Justice Frankfurter, dissenting), and *Hillsborough v. Cromwell*, 326 U.S. 620, 630.

III. *Matter of McLinn, supra*, at least on a superficial reading, imports into our jurisprudence a new standard for appellate review of such district court rulings; i.e., a de novo or plenary review with no deference accorded to the lower tribunal's "prediction".

The Ninth Circuit is generally considered to be the first of the appellate courts to espouse, with great vigor, the so-called "de novo" or "plenary" review standard.[8]

---

[8] But see, *Tanner Co. v. W.O.I.I., Inc.*, 528 F.2d 262 (3rd Cir., 1975).

Its opinion in *In re McLinn*, 739 F.2d 1395 (9th Cir. 1984) condemned, in no uncertain terms, what had been, up to then, the almost universal practice of Circuit Courts of Appeal to extend to district judges' determinations of unsettled state law questions varying degrees of deference. It flatly held that henceforth that that Circuit's " . . . appellate review of conclusions of state law should be under the same independent de novo standard as conclusions of federal law."[9]

It predicated that enunciation of its new procedure upon the following factors:

FIRST: Having pointed out that it (the Circuit Court) always reviews by a de novo standard district judges' determinations of federal law questions, it went on to observe,

> "There is no sound reason why we have a lesser appellate duty to the parties to make a correct, independent determination when the question is one of state law. The policy concerns supporting the de novo standard apply as well to questions of state law as to questions of federal law. The appellate function is the same in each case and the same structural advantages encourage correct legal determinations."[10]

SECOND: Relying upon its opinion in *U.S. v. McConney*, 728 F.2d 1195 (1984), (which was a criminal matter under the federal statute commonly known as the Racketeer Influenced and Corrupt Organizations Act), Judge Hug, writing for the majority in *McLinn supra*,

---

[9] 739 F.2d 1395, 1403.

[10] *Id.* at 1398.

catalogs as reasons for de novo review in diversity cases involving unsettled state-law questions the fact that:

> A.) appellate judges are freer to concentrate on legal issues because they are not "encumbered" by the process of hearing evidence,[11] and
>
> B.) at least three members of the appellate panel are bought to bear in every case, thus "it stands to reason" that the risk of judicial error on law questions is minimized;[12]

THIRD: Recognizing that this Court routinely refuses to review state-law questions, the Ninth Circuit's opinion in *McLinn, supra,* ascribes this practice to " . . . the assumption (by this Court) that it need not exercise its discretionary jurisdiction to do so because the appellate panel has exercised its mandatory appellate jurisdiction by giving full and independent review to the decision of the trial judge". This leaves this Court free to conserve its discretionary powers and resources for matters of national import and policy.[13]

FOURTH: Recognizing the non-binding nature of its opinion on state law questions, the Ninth Circuit nonetheless relies on the "precedential importance" of its appellate determination of state law as a ground for de novo or plenary review of such unsettled questions in diversity cases.[14]

---

[11] 739 F.2d 1395, 1398, citing *U.S. v. McConney,* 728 F.2d 1195 (9th Cir. 1984).

[12] *Id.* at 1398.

[13] *Id.* at 1399.

[14] *Id.* at 1401.

The *McLinn* court preaches that only a full-blown judicial review of every district court's determination of unsettled law in diversity cases meets the test of proper judicial review. Facially, this sounds as attractive and as American as apple pie. We submit that a careful analysis of *McLinn, supra,* shows its true character to be more like green persimmon pie.[15]

IV. In reality, *Matter of McLinn, supra,* states the long prevailing standard actually used by all Circuit Courts of Appeals in different terms. This is a "war of words" and not of substance.

The dissent in *McLinn, supra,* by Circuit Judge Schroeder, joined in by four other Circuit Judges, is one of the best arguments that can be found for rejecting the view of the *McLinn* majority. There a careful and articulate review is made of the "deferential rule" as expressed by the terms "great weight" or "substantial deference", with leading cases from the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits being cited by Judge Schroeder as examples. The key point of the dissent is aptly phrased:

> "By giving 'substantial deference,' or what I believe to be the better phrase, 'great weight,' to the decisions of the district courts, appellate courts do not suspend their own thought processes. They treat the expertise of the district judge in local law as a factor that requires a careful review of the district court's decision before the appellate court reaches a different

---

[15] With apologies to Professor Woods, *supra,* fn. 4, 26 Arizona Law Review 759, at 760.

> conclusion. The circuits have not, as the majority would have us believe, been guilty of a massive 'abdication' of responsibility."[16]

The dissenters in *McLinn* correctly point out, after acknowledging the district court's special expertise in state law, that giving special consideration or weight to this factor does not mean that appellate review of such state law issues should be or will be more restrained than its review of other legal matters. As Judge Schroeder says:

> "The special weight that should be given to a district court's decision is not intended to make our examination any less thorough or dependent. It is intended to make us more careful. Its purpose is to prevent hasty and perhaps arbitrary decisions in areas of local law with which we may not be fully familiar. Giving special consideration to a district court's decision of a state law question is a responsible exercise of appellate authority."[17]

The fact is that the *McLinn* rule of de novo review is, in reality, what happens in all cases where the circuit courts rely on the "deferential rule". As said by Judge Schroeder:

" . . . the problem . . . is basically one of terminology."[18]

The case at bar is a perfect example of how a "deferential" circuit court does in fact give a plenary review to

---

[16] 739 F.2d 1395, 1404 (1984).

[17] Id. at 1406.

[18] Id. at 1495.

a district court's holding on a state law issue; in effect, giving a "de novo" review, although clothing it in "deferential" robes.

Here the circuit court carefully considered every case cited by the Petitioner in its brief to that court and differentiated each of them from the case at bar. It held that the usual rules applicable to "academia" were not appropriate here, because of the unique aspects of this case. The exact language of the circuit court is deserving of careful reading, and we have set it out in Appendix C hereto.

Only after a very careful analysis of the Petitioner's arguments did the circuit court, in this case of first impression, approve the district court's state law holding. It did, after a "de novo" review of the situation say in effect, "we can find no reversible 'error' in the district court's ruling."

The instant case, however, is not the only case which demonstrates that circuit courts do, in fact, review issues of law "de novo" while reciting the "differential" rule. When they feel the district court is wrong, they do not hesitate to say so.

In *Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358 (1985), the Seventh Circuit, in overruling the district court's determination that under Wisconsin law, the plaintiff-appellee (cross-appellant) *Afram* was not entitled to pre-judgment interest, did not hesitate to voice the "deferential" rule ("great weight") yet it proceeded to review the issue "de novo". "We think it fairly plain that Wisconsin law allows pre-judgment interest in a case

such as this."[19] In support of this rule, it then proceeded to give a detailed explanation of the pertinent Wisconsin cases.

In *PPG Industries, Inc. v. Russell*, 887 F.2d 820 (7th Cir. 1989) the district court, in granting the defendant's motion for summary judgment in a diversity suit brought to recover damages for the defendant's alleged breach of a covenant not to sue, ruled the covenant unambiguous under the state law. Upon appeal, the 7th Circuit after saying:

> "We find ourselves in agreement with respect to the statement of these governing principles (i.e. "in applying state law in a diversity action, while mindful of our duty to review determinations of law de novo, we accord great weight to the determination of the district court sitting in the state whose law is to be applied")",[20]

went on to review the covenant at length in the light of Indiana law and held it to be ambiguous, thus declaring the district court's summary judgment ruling to be error.

Similary in *Norton v. St. Paul Fire & Marine Insurance Co.*, 902 F.2d 1355 (1990) the Eighth Circuit did not hesitate to reverse a district judge's finding that the plaintiffs' daughter's use of mobile home left the plaintiffs uninsured under a policy which specifically excluded coverage when it (the vehicle) is "used as a permanent residence". The Eighth Circuit, as did the Circuit Court in

---

[19] 772 F.2d 1358, 1370 (1985).

[20] 887 F.2d 820, 823 (1989).

the *PPG Industries* case, *supra*, melded the two standards,[21] and proceeded to reverse the trial court, holding that the policies' exclusion for use as a "permanent residence" was ambiguous, as distinguished from the magistrate's ruling of it being "unambiguous".

Earlier in *Harris v. Pacific Floor Machine Manufacturing Co.*, 856 F.2d 64 (8th Cir. 1985) the Eighth Circuit, in a diversity case involving Arkansas law, held that a trial judge's refusal to give a requested jury instruction as to the meaning of the term "unreasonably dangerous" was reversible error. Here again we see a two-pronged statement of the law of appellate review.[22]

Recently in *Foster v. National Union Fire Insurance Co.*, 902 F.2d 1316 (1990), the Eighth Circuit in affirming a lower court's view of Arkansas law concerning the

---

[21] 902 F.2d 1355, 1357 (1989), "In general, we accord substantial deference to a district court's interpretation of the law of the state in which it sits. (Citation omitted) We are not, however, bound by the district court's determination and will reverse if we conclude that the court has not correctly applied state law.

[22] 856 F.2d 64, 66, "In cases where the rule of decision is supplied by state law, or normal practice is to defer to the state law ruling of a district judge who sits in the state whose law is controlling (citation omitted) . . . but we think *this is one of those unusual cases where the presumption does not lead to affirmance . . . we have a definite and firm conviction that the reason given for rejecting the instruction was insufficient.*" (Emphasis supplied.) See also, *Bennett v Allstate Insurance*, 889 F.2d 776, 779 (8th Cir. 1989).

liability of the defendant to the plaintiffs under a fidelity bond again makes use of the "merged" rule.[23]

As we have remarked earlier, the "deferential" rule is really judicial shorthand – allowing courts of appeal to avoid the useless expenditure of precious time and energy, when a careful review leaves the court satisfied that the district judge did not commit reversible error. Not being judicial slaves, nor as Judge Frank said in a different legal context, but still arising out of *Erie*, not being required "to play the role of ventriloquist's dummy",[24] circuit court judges do not blindly accept every district court judge's determination of unsettled state law questions in diversity cases. Because they rely on the "deferential" rule to avoid writing unnecessary legal opinions which simply 'gild and lily', and affirm otherwise clearly correct lower court rulings, does not mean that when, after appropriate briefing, oral argument, study and reflection, they conclude the trial judge to be in error that they cringe from the task of taking pen in hand and laboriously crafting an opinion which cogently and clearly sets forth the erroneous ways of the lower tribunal.

---

[23] 902 F.2d 1316, 1318 (1990), " . . . we note that while there is not a decision interpreting the statute in question by the Supreme Court of Arkansas, the district judge is a former member of that court. Her judgment on the matter is due considerable weight. We have not, however, failed to closely examine the matter ourselves."

[24] *Richardson v. Comm. of Int. Rev.*, 126 F.2d 562, 567 (2d Cir. 1942).

This war of words – "de novo", "plenary", "deference", "great weight", "firm conviction of error", – is just that. In reality all circuits do in fact give appropriate and meaningful review to all issues that come before them. To hold otherwise is to ascribe to dedicated jurists a lack of appreciation for their lofty and responsible positions in our judicial system. The Petitioner may subscribe to that theory,[25] but the Respondent, and her counsel, disassociate and distance themselves from that position.

V. If, and to the extent that *McLinn* goes beyond past practice, and precedents set by this Court, it is wrong and unsound.

A. The *McLinn* court's reliance upon *Runyon*[26] and *Butner*[27] is misplaced, and this mistake let it into error into requiring "de novo" review of state law issues in every diversity case.

The *McLinn* court in attempting to use *Runyon* as a predicate for its proposition that this Court refrains from reviewing unsettled state law questions raised in diversity cases in reliance upon a circuit court's having given "full and independent review to the decision of the trial judge"[28] in reality builds a straw man and then proceeds to knock it down. *Runyon* is not an *Erie* case. *Runyon* is a civil rights case in which the trial court "borrowed" a state statute of limitations and held the petitioners' claim

---

[25] See Petitioner's Brief on Merits, pages 26 & 27 for a familiar rendition of this argument.

[26] *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586 (1976).

[27] *Butner v. U.S.*, 440 U.S. 48, 99 S.Ct. 914 (1979).

[28] *Matter of McLinn*, 738 F.2d 1395, 1399 (9th Cir. 1984).

for damages barred thereby. This Court, after noting that had Congress set an applicable limitations statute that such would control the case, went on to hold that since Congress was silent in this regard, such silence is interpreted to mean that it is federal policy to adopt the local law of limitations. The Circuit Court had affirmed the lower court ruling, and this Court in reaffirming that action, stated that you have " . . . accepted the interpretation of state law in which the *District Court* and the *Court of Appeals have concurred* (emphasis by the *McLinn* court), even if an examination of the state law issue without such guidance might have justified a different conclusion".[29] The context of *Runyon* makes it clear that the question before the *McLinn* court was not and could not have been before this Court for decision in *Runyon*. The fact that *Runyon* is not an *Erie* case, with none of the judicial policy overtones of *Erie* applicable, demonstrates the irrelevancy of the quoted language about District Court and Circuit Court concurrence as to the question now presented.

Butner, supra, just as *Runyon,* is not an *Erie* case. There the Court made it clear that the issue was not whether the Court of Appeals had correctly applied North Carolina law, but rather what was the proper interpretation to be given to federal statutes concerned with the administration of bankrupt estates. In just so many words this Court said that its purpose in *Butner* was to resolve a conflict

---

[29] *Runyon, supra,* p. 181; citing *Bishop v. Wood,* 426 U.S. 341, 346, and n. 10 (1976).

between circuits concerning the right approach to a dispute of this kind (i.e. a dispute involving a federal statute governing bankrupt estates).

In *Butner* the Court of Appeals by a 2 to 1 decision, reinstated a bankruptcy judge's holding which had been reversed by the district court. The pivotal question in *Butner* was whether property interests in rents collected by a trustee in a bankruptcy proceeding should be adjudicated by the application of state law (as held by a majority of the Circuit Courts of Appeals) or by the application of a federal rule of equity (as espoused by a minority of the Circuit Courts of Appeals). It was this question of federal law that this Court addressed in *Butner*. That this Court was not dealing in *Butner* with the issue before the *McLinn* court is clear from the language used by this Court. After noting that the parties had dealt at great length with the state law question, Mr. Justice Stevens, speaking for a unanimous Court said at page 58 of 440 U.S.:

> "We decline to review the state law question. The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues."

That language is not, we submit, supportive of the interpretation made of it by the *McLinn* court. At page 1399 of 739 F.2d Judge Hug, and his confreres, concludes that this Court, by the quoted language, is not giving weight or deference to the decision or opinion of either the district court or circuit court, but rather "simply not reviewing the state law question that has been fully

reviewed and determined by the intermediate appellate court." Nowhere in the quoted *Butner* language is there any inference to or implication of a full review of a state law question by either court, district or circuit. This Court's statement is simple and straight forward – "federal judges . . . in their respective districts and circuits are in a better position – etc., etc."

The only fair reading of the quoted *Butner* language is simply that this Court will not review state law questions. Nothing more – nothing less. *Butner*, a non-*Erie* case, is hardly supportive of the tortured interpretation given it by the *McLinn* court. The comment by Judge Hug to the effect that implicit in this Court's practice of not reviewing state law questions is an assumption of full and independent review by the intermediate appellate court finds no support in either *Runyon* or *Butner* that would make any such comment applicable or appropriate to an *Erie* case, in which it is the duty of the lower courts to "divine" or "predict" how a state supreme court would rule on the same issue at a later date. Both *Runyon* and *Butner* are at best irrelevant to an *Erie*-type diversity case such as the *McLinn* case or the case at bar.

The *McLinn* court in reading *Runyon* as a case which holds this Court's deference to lower court rulings on state law questions to be predicated upon full review and affirmance or reversal by the intermediate appellate court as distinguished from deference to a district court's decision, cites *Bishop v. Wood*, 426 U.S. 341, 347 and Note 10. It is, we submit, significant that the *McLinn* court did not discuss the *Bishop* case nor make any analysis of this Court's opinion therein. Just as neither *Runyon* nor *Butner* are *Erie* cases, *Bishop* is not a case controlled by the *Erie*

doctrine, nor the policy considerations implicit and explicit therein. It is a case, however, which is most meaningful in the area of deference to be given to "experience" in local law and the intuitive nature of the "prediction" process that must take place in *Erie* cases. *Bishop* involved a police officer who alleged he had been wrongfully dismissed by municipal officials without a hearing. The ordinance controlling the plaintiff's employment was construed by the district court to make the officer an employee at will. The Fourth Circuit Court of Appeals, initially affirmed the district court by a two-to-one decision.[30] Then, after an *en banc* hearing, it reaffirmed the district court, without opinion, by an equally divided court. The issue in *Bishop* was essentially a constitutional one of due process arising out of the state law question as to the proper interpretation of the applicable employment ordinance of the City of Marion, North Carolina. After commenting that the ordinance in question was reasonably susceptible of two interpretations, one guaranteeing the officer's continued employment, and the other not granting such a guarantee, and, after observing that there was no authoritative interpretation by a North Carolina state court, this Court remarked that it had the opinion of the district judge "who, of course, sits in North Carolina and practiced law there for many years. *Based upon his understanding of state law*, he *concluded* that the petitioner held his position at the will and pleasure of the city."[31] (Emphasis added.) This Court went on to refer to the fact of reaffirmance by an evenly divided Fourth Circuit

---

[30] 498 F.2d 1341 (4th Cir. 1974).

[31] 426 U.S. 341, 345, 96 S.Ct. 2074, 2078 (1976).

Court, without opinion, and then said *"in comparable circumstances,* this Court has accepted the interpretations of state law in which the district court and the court of appeals have concurred even if an examination of the state law issue without such guidance might have justified a different conclusion."[32]

We set out in Appendix D hereto this Court's footnote 10 as appended by the Court at this point in its Opinion in *Bishop.*

This Court used the words "in comparable circumstances", and there it was referring to the fact that it had a district court judge's opinion and a reaffirmance thereof by an evenly divided court of appeals, without opinion.

We respectfully submit that none of the cases decided by this Court, and cited by the *McLinn* court, support its proposition that this Court defers on matters of state law in reliance upon a de novo review of the district court's interpretation thereof by a circuit court. On the contrary, those cases which are in point,[33] teach that such reluctance to expound on unsettled state law is grounded in the same rationale that causes circuit courts to defer to district court, i.e., (i) a recognition of the "predictive" nature of the task; and (ii) an awareness of the district judge's familiarity with local practice and law.

---

[32] Id. at 346; 2078.

[33] See, Section II hereof, *supra,* and cases cited therein.

B. *McLinn, supra,* notwithstanding, a majority of the Circuit Courts of Appeal still follow the "deferential rule".

We have earlier commented upon the superficial appeal of *McLinn, supra,* as it seems to echo the innate American sense of fair play. A majority of Circuit Courts of Appeals have not accepted this pronouncement of appellate review, which is novel indeed, at least to the extent that it requires a full and complete legal analysis of each issue of state law in diversity cases by them. We cite just a few of the more recent cases from different circuits that still espouse and adhere to the oft-but-variously-stated rule of "deference".

FIRST CIRCUIT

Croteau v. Olin Corp., 884 F.2d 45, 46 (1989); " . . . one who chooses to litigate his state action in the federal forum . . . must ordinarily accept the federal court's reasonable interpretation of extant state law . . . an interpretation to which we owe some deference."

SECOND CIRCUIT

Ewing v. Ruml, 892 F.2d 168, 171 (1989); "Where, as here, the interpretation of state law is made by a district judge sitting in that state, it is entitled to great weight and should not be reversed unless it is clearly wrong."

FIFTH CIRCUIT

1. *In Re: Fox,* 902 F.2d 411, 413 (1990); "On issues of state law, we ordinarily give considerable weight to the

opinion of lower court judges who sit in the state and have practiced before its courts and are therefore more familiar with local law."

2. *Finch Equipment Corp. v. Frieden*, 901 F.2d 665, 667 (1990); " . . . we observe that this court gives deference to the district court's interpretation of state law."

3. *Matter of Hyde*, 901 F.2d 57, 59 (1990); "In cases raising unsettled questions of state law, the district court is entitled to substantial deference in its 'determination of the law of the State in which it sits'."

See also *Belliache v. Fru-Con Construction Corp.*, 866 F.2d 798, 799 (1988); *Mitchell v. Random House, Inc.*, 865 F.2d 664, 668 (1988).

SIXTH CIRCUIT

1. *Self v. Wal-Mart Stores, Inc.*, 885 F.2d 336, 339 (1989); "Our opinion in Gibson teaches that we should give considerable weight to the trial court's views on such questions of local law."

2. *Diggs v. Pepsi Cola Metropolitan Bottling Co.*, 861 F.2d 914, 927 (1988); "Our court has consistently held that the judgment of a local district judge sitting in a diversity case, as to the application of state law, is entitled to considerable deference."

SEVENTH CIRCUIT

PPG Industries, Inc. v. Russell, 887 F.2d 820, 823 (1989); " . . . we accord great weight to the determination of the

district court sitting in the state whose law is to be applied."

See also *Afram Export Corp. v. Matallurgiki, Halyps, S.A.*, 772 F.2d 1358, 1370 (1985).

EIGHTH CIRCUIT

Norton v. St. Paul Fire & Marine Insurance Co., 902 F.2d 1355, 1357 (1990); "In general, we accord substantial deference to a district court's interpretation of the law of the State in which it sits. (citation omitted). We are not, however, bound by the district court's determination and will reverse if we conclude if the court has not correctly applied state law."

See also *Foster v. National Union Fire Insurance Co.*, 902 F.2d 1316, 1318 (1990), *supra; Bennett v. Allstate Insurance Co.*, 889 F.2d 776, 779 (1989), *supra; Modern Leasing Inc. v. Falcon Manufacturing of California*, 888 F.2d 59, 62 (1989); *Luke for Luke v. Bowen*, 868 F.2d 974, 997 (1989); *Harris v. Pacific Floor Machine Manufacturing Co.*, 856 F.2d 64, 67 (1988), *supra*.[34]

TENTH CIRCUIT

Weiss v. U.S., 787 F.2d 518, 525 (1986); "Generally, we apply the clearly erroneous standard in reviewing a

---

[34] See Section IV, *supra*, for our position that these 7th and 8th Circuit cases represent a melding of the "de novo" and "deferential" rules, which allows the deference standard to be used as "judicial shorthand" where affirmance is called for, and prescribes a plenary review when the court has a "firm conviction" that the district court was in error.

district court's grant of summary judgment on a legal question upon which the state's highest court has not ruled."

We respectfully submit that it is clear beyond question that *McLinn, supra,* notwithstanding, many of our Circuit Courts of Appeals have continued to espouse the deferential rule. The rationale, and the appropriateness, of this espousal is founded in the *Erie* doctrines of *federalism, uniformity,* and *discouragement of forum shopping,* and supported by the common sense recognition of the "predictive" nature of the district court's task and the acknowledgment of his "expertise" in local law, as distinguished from the circuit judges lack of familiarity with the peculiarities of individual state holdings.

C. To the extent that *McLinn* requires a written opinion of each Circuit Court of Appeals ruling on questions of unsettled state law passed upon by the district court in the trial of diversity cases, it is wrong, unsound, and sets bad jurisprudential policy.

1. Accepting, arguendo, that *McLinn* represents a departure from established appellate practice in all circuits, it is wrong and unsound.

a. The policy considerations of *McLinn* majority and minority.

The Majority.

1. The policy that every party is entitled to a "full, considered, and impartial review of the decision of the trial court",[35] is applicable as much to a state law question as a federal law question.

---

[35] 739 F.2d 1395, 1398 (1984).

2. The structural differences between the district court and circuit courts mandate de novo or plenary review of such unsettled state law questions, since appellate courts are better suited to consider questions of law.

3. The precedential value of a circuit court opinion requires a full and careful analysis of each such state law question.

The Minority.

1. The "predictive" nature of the trial court's function when faced with an unsettled state law question in a diversity case justifies the "deferential" rule.

2. The "deferential rule" does not interfere with the circuit court fulfilling its responsibility to give appellants a meaningful review of the district court's determination of such questions.

3. The *McLinn* majority's "de novo" of "plenary" standard of review will result in an inordinate increase of the workload of appellate courts without a compensating or corresponding increase in either legal accuracy or efficiency.

b. The *McLinn* policy considerations analyzed:

The Majority.

1. The *McLinn* holding that a "full, considered, and impartial review" is as necessary in state law questions in diversity cases as it is in federal law cases, fails to take into account the very special and significant duties imposed on the trial court by *Erie, supra,* in such cases.

Under *Erie* the trial court is charged with the responsibility of maintaining the very delicate balance between the federal government on the one hand and the states on the other.[36] The trial judge is not interpreting a federal statute or applying federal case law, where by statute the parties have a right of appeal subject to ultimate review by this Court. In diversity cases, he must fathom out how a state supreme court will rule on the issue at a later date. The factors of "forum-shopping" and "uniformity" usually associated with *Erie* are not the only considerations. The doctrine of "federalism" is significant in the trial judge's role in a diversity case. The *McLinn* court did not deal with this in any manner. We submit that a proper analysis of the appellate court's function in a diversity case requires some recognition of this principle. It does not follow, as night follows day, that because there is a right of appeal in diversity cases, that this right is coextensive with the right of appeal in "federal law" cases, even though the Ninth Circuit says so. The doctrine of "federalism" and the "predictive" nature of the trial judge's role militate against any such equality of review. As we note later, the fact is that there is no "correct answer" to such unsettled state law questions within the federal judiciary. The Circuit Court of Appeals and this Court notwithstanding, it is the state supreme court (or legislature) that has the last word.

2. The *McLinn* court relies heavily upon its earlier opinion in *U.S. v. McConney*, 728 F.2d 1195 at 1201-1204 (9th Cir.1984) (en banc) in discussing the structural differences between the district court and circuit court.[37] Those

[36] See, *Hanna v. Plumer*, 380 U.S. 460 (1965, *supra*, n 1).

[37] 739 F.2d at 1398.

differences are clear and unequivocal, but beside the point, insofar as the question now at bar is concerned. In federal law question cases (and please note that *McConney* is such a federal criminal law matter involving the issue of how to review a mixed question of law and fact), the distinction between the courts is obvious and the rules of review well-established, i.e., review of pure facts is limited by Federal Rule of Civil Procedure 52(a) to the "clearly erroneous" standard; law questions are subject to "de novo" or "plenary" review. *McConney*, relying on *Pullman Standard v. Swint*, 456 U.S. 273, 289 n. 19, 102 S.Ct. 1781, 1790 n. 19, 72 L.Ed.2d 66 (1982) held the de novo standard applicable to mixed questions. While, as to facts, the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a) is equally applicable to diversity cases and federal cases, the review standards applicable to law questions are not, for several reasons. First, there is no "right" or "correct" answer to an unsettled state law question within the federal system. Secondly, there is no reason to conclude that, even assuming that three circuit judges are better able to concentrate on legal issues than is the trial judge, that they are any better able to "predict" or "guesstimate" how the state supreme court or legislature will rule or act at a later date, than is the local trial judge, who obviously is in as good, if not a better, position to so "divine".

3. The *McLinn* court's exposition of the "precedential importance"[38] of its opinions as to unsettled state law questions in diversity cases is in error. Of necessity the *McLinn* court recognized that its opinions as to state law

[38] 739 F.2 1395, 1401 (9th Cir., 1984).

questions are not binding precedent,[39] yet it felt they are "of precedential importance". The majority went on to postulate that since *Erie* espoused the virtue of "uniformity", then "uniformity among federal interpretations of state law tends to create state-federal uniformity."[40] Implicit in this statement is the concept that in some fashion later state court rulings on such unsettled state law questions will be influenced by the opinions of the circuit courts of appeal. In effect, the circuit courts would then be fashioning "federal common law" – what the circuit judges think the law "ought to be", rather than predicting how the state court would later rule. *Swift* v. *Tyson*,[41] revisited; the phoenix of old rises from the ashes of *Erie*. The mere fact that pending some definitive ruling by a state supreme court on a subject of unsettled state law, some other court might cite a circuit court's "predictive" view of that event is hardly a sound reason for rejecting the "deferential rule" which is in reality grounded in solid common sense and a recognition of the trial court's superior predictive ability.

There have been numerous instances where a state supreme court has later ruled contrary to the decisions of the circuit courts of appeal. In fact, in many of these cases, the state supreme court, has, in reality, adopted a rule which had previously been adopted by the lower district court and reversed by the circuit court of appeals. For an interesting comment in this regard, see the opinion of Judge Brown (concurring) in *United Service Life*

---

[39] *Id.*

[40] *Id.*

[41] 41 U.S. (26 Per.) 1 (1842)

Insurance Co. v. Delaney, 328 F.2d 483, 486 (5th Cir.), cert. den. 377 U.S. 935 (1964).[42] The transient nature of decisions by federal circuit courts of appeal on unsettled state law questions is characterized by the same Judge Brown in the same *Delaney* case, *supra*, in such graphic terms that it bears repeating here.

> "The law announced by us becomes the law of the Medes and Persians which altereth not until the state authoratively declares the law to be otherwise. When subsequent state declaration is made, our former opinion evaporates as though it never existed. The Moving Finger writes, and having writ, moves on. But it may be that having written, what we write is soon erased."

2. The *McLinn* "de novo" review standard is unmanageable and unworkable as an instrument of effective and efficient judicial administration.

The core question in the case at bar is whether the Constitution, as it is reflected in *Erie*, demands that Circuit Courts of Appeal adopt a standard of appellate review that requires them to use their ever-dwindling judicial manpower and resources to fashion opinions on

---

[42] "Though our decisions survive the discretionary review of certiorari, most of the time because they are really not "certworthy", . . . many of them do not fare so well when they are tested in the place that really counts – the highest, or first writing court, of the state concerned . . . Within the very recent past both Texas and Alabama have overruled decisions of this Court, and the score in Florida cases is little short of staggering."

unsettled state law questions in cases where only the parties before the court are bound, and where those hard wrought views are of little or no precedential value.

To answer this question fairly, requires a brief analysis of the process by which these issues of unsettled state law come before those circuit courts. In the first instance, we are dealing with diversity of citizenship cases in which, by *Erie*, substantive state law is controlling. Where the state's supreme, or highest, court has ruled on the legal issue or where the state legislature has spoken by way of a controlling statute, the answer is clear. If per chance the trial court mistakenly applies the law or statute then the circuit court, will, even under the so-called "deferential rule", reverse. It is in those cases where a question of state law is unclear that the trial judge must use its "lawyers intuition" "instinct" "experience", or "feel" to arrive at a prediction of what the state law will be declared to be by the state supreme court or legislature at a later date. Practicing trial lawyers do this frequently; trial judges do it just as often, if not more frequently. The task simply "goes with the territory". The loser of that prediction is usually the one who wants a "second bite" of the apple, in the hope that the green persimmon has somehow become a MacIntosh. We submit that unless and until the loser makes some convincing showing that the trial judge's "prediction" was clearly wrong, that its determination should stand. The circuit court is in no better position to "predict" than is the trial judge. In fact, we have demonstrated, supra, that in reality it is the trial judge who usually makes the better prognosticator.

In every case that comes before the Circuit Court of Appeals the parties have briefed these questions of unsettled state law, presenting their views of why the trial judge was right or wrong, depending upon their respective positions as appellant or appellee. At oral argument they have further expounded upon the accuracy or poor marksmanship of the trial court. The circuit judges on the appellate panel have questioned counsel carefully about various points that seem troublesome or unclear to them. Finally, while we have no personal knowledge of what goes on behind the scenes, in conferences or private discussion between and among the judges and their law clerks, we have no hesitancy in proposing the proposition that, in fact, serious consideration is given to each and every argument presented by the parties. To contend otherwise would be outrageous. In point of fact, it is clear, in the case at bar, that the circuit court did decide that the trial judges' view of the doctrine of substantial performance was not impermissible or unreasonable, and truly sound as a matter of general contract law. In fact, they reached that conclusion de novo through the "in chambers" process and then, using the "deferential rule" affirmed the district court's prediction of what the Rhode Island Supreme Court would do if faced with the case at bar.

This is sound use of judicial manpower and resources. This case binds only the parties. It is of no particular precedential value since, as a matter of accepted law, the Rhode Island Supreme Court could tomorrow hold to the contrary, and all Rhode Island litigation would thereafter be bound thereby. To require the circuit court to perform, as the Petitioner would

require,[43] would be to impose a too heavy burden on an already otherwise overburdened judiciary in circumstances where such is of little moment to anyone but the parties, who already have had a fair and impartial trial and an opportunity to demonstrate the erroneous ways of the trial judge. Were this Court to impose such a standard and time-consuming process as contended for by the Petitioner, the burden upon our federal judiciary would be awesome indeed.[44]

Not every issue that comes before a trial judge requires or justifies any such detailed analysis or exposition. A heart/lung resuscitator is not required to treat the common cold, and not every issue of unsettled state law that arises in the trial of a diversity case demands (nor do the exigencies of orderly trial procedure allow) such a sweeping legal analysis. But even assuming that the trial judge may have given the issue less review and analysis than a party may think it should have, such a detailed written opinion, canvassing all the various sources cited by the Petitioner as appropriate resource material, should not be required of the circuit court unless the complaining party makes out a pretty fair case that the district court fell into substantial and important error. The "de

[43] See page 21 of Petitioner's Petition for Certiorari for a full recitation of the materials to be convassed and dealt with by the trial court before it may "predict" how a state supreme court will rule at a later date.

[44] Even the Ninth Circuit in *U.S. v. McConney*, 728 F.2d 1195, 1201, n. 7 says "It can hardly be disputed that application of a non-deferential standard of review requires a greater investment of appellate resources than does application of the clearly erroneous standard."

novo" standard of the *McLinn* majority requires no such showing of injury or error. Under *McLinn*, each and every case, including each and every issue of unsettled law, is automatically and without exception subjected to such careful scrutiny, review and decision writing. The effect of such a standard will be, as Judge Schroeder predicted in *McLinn*,[45] to encourage appeals, increase remands, retrials and post-remand appeals, all in cases of no true precedential value, and where, if the issue is basically one of fact (such as in the case at bar – did the plaintiff in fact 'substantially perform' her contract), the final result will probably be the same as it was at the original trial.

CONCLUSION

The "deferential rule", in whatever terms it may be described, i.e., "great weight", "substantial deference", and the like, is by far the traditional standard applied by Circuit Courts of Appeals when reviewing unsettled questions of state law as determined by the trial judge in diversity cases. This standard admirably comports with the aims and goals of the doctrine of "federalism" as embodied in *Erie*, for it recognizes the "fourth dimensional" or "predictive nature" of the task faced by trial judges in resolving those issues. It allows the circuit courts to give a meaningful review of those determinations without the necessity of writing long involved opinions that do nothing more than affirm the district court

[45] 739 F.2d 1395, 1406 " . . . the majority signals to litigants that reversals will be easier to obtain, thus encouraging more appeals.

and set no significant or important precedents. As noted these opinions are neither binding upon, nor instructive to, lower courts in other cases. To require such "de novo" review, in each and every diversity case of each and every issue of unsettled state law, violates the spirit of *Erie* in that:

First: It encourages circuit courts to substitute their "prediction" of state law for that of the district court, when in reality the district court judge is in as good, if not better, position to so "divine";

Second: It leads to the creation of "federal common law" – law as the circuit judges think it ought to be – rather than recognizing that the ultimate determination of state common law belongs with state courts;

Third: It encourages appeals by unsuccessful litigants by engendering the hope of easier reversal, leading then to a proliferation of remands, retrials and post-remand appeals;

Fourth: It promotes rather than restricts forum shopping by leading litigants to seek out jurisdiction of their claims in the forum which has not spoken to an issue, if the other has ruled adversely; and

Fifth: The requirement of "plenary" review without any requirement that the appellant demonstrate, with some degree of certainty, that the trial judge committed substantial, important and/or clear error, places an inordinate and too-burdensome task upon circuit courts that already suffer from lack of manpower, lack of judicial resources, and heavy and growing dockets.

For the reasons stated this Court should affirm the Judgment of the United States Court of Appeals for the First Circuit in the case at bar.

Respectfully submitted,

EDWARD T. HOGAN, Esq.*
THOMAS S. HOGAN
HOGAN & HOGAN
201 Waterman Ave.
East Providence, R.I. 02914
(401) 421-3990
Counsel for Respondent

*Counsel of Record

APPENDIX A

(p. 7) I. This is not a case of student vs. academia.

In reviewing the case at bar it is necessary, in the first instance, to have in mind at all times, the precise nature of the "contract between the parties". We do not have here the usual situation of a contract, implied in law, from the usual documents of an application for admission, college or university handbooks which set forth academic standards to be achieved and/or maintained, disciplinary rules and regulations to be adhered to, and the simple payment of fees and expenses. Here the "contract" by action of the parties has become unique and special. The document of December 18, 1984, Respondent's Exhibit 38 (set out in Petitioner's Appendix to its Petition herein) renders the contract between the parties something special, or "one of a kind". Even the Petitioner's Dean of Nursing agrees that the December 18, 1984 "contract" was special. At Appendix Vol. II, p. 709a, we find the following:

> "Q Dean Graziano, how many students have you entered into a weight loss contract with?
>
> A I don't recall.
>
> Q Anyone ever than Sharon?
>
> A No, I don't believe so.
>
> Q So that this is a unique document, is it not?
>
> A Yes, it is.
>
> Q Not duplicated neither before nor since.
>
> (p. 8) A Not that I can recall."

The Trial Justice found the instant contract 'special' when on April 14, 1989 (Trial day No. 7) he said at App. Vol. II, page 891a:

> "This case is different in that a special contract came into existence between the parties on December 18, 1984. That contract is in writing, and is Plaintiff's Exhibit Number 38, what's been referred to during this trial as the contract. That was a valid and binding contract between the parties."

We are therefore dealing, not with the usual case of a student complaining of a failing grade or one accused of some disciplinary infraction such as "cheating". Rather, we are dealing with an honor student who failed to lose as much weight as she promised she would do over a given period of time. Quite a different thing than a flunking medical or law student, or one who has deliberately cheated on an examination or plagerized his or her thesis or a test essay. We are involved with a most unique situation – one for which we have been unable to find a precedent, although we have "searched the books high and low" for guidance. The invasion by the College and its faculty into the Respondent's private life is the distinguishing factor in this litigation.

II. The doctrine of substantial performance was correctly applied to the case at bar.

We recognize that the question of whether the doctrine of substantial performance was correctly applied to the case at bar by the trial justice is not technically before the Court on the instant Petition. However, the approval

(p. 9) thereof by the Circuit Court of Appeals is questioned by the Petitioner, insofar as it complains that the Circuit Court did not give the question plenary view.

In its "Summary" on Page 11 of its Petition, the Petitioner alleges that the District Court "created a novel and highly troubling rule of State law" in the face of relevant decisions of the Rhode Island Supreme Court. At pages 21 and 22 of its Petition, we learn that in its view, the Rhode Island Supreme Court has in the case of *National Chain Co. v. Campbell*, 482 A.2d 132 (R.I. 1985) and *Ferris v. Mann*, 99 R.I. 630, 210 A.2d 121 (1965) "long limited the application of the doctrine of 'substantial performance' to construction contract cases". Nothing in either of those cases, which admittedly are construction cases, limits the application of the doctrine to building contracts. The Rhode Island Supreme Court has not declared itself as to the doctrine's applicability to other classes of cases. There is nothing in any reported Rhode Island Supreme Court case which can be construed as indicating that that Court would do other than follow the general trend throughout the country and hold the principle to be controlling in a broad range of situations. As said in 17 Am. Jur. 2d Contracts §375 pp. 819 and 820:

> "While the doctrine of substantial performance is applied most frequently in building and construction contracts, it is not so limited and may be applied in the case of any kind of contractual obligation to perform."

In *Division of Labor Law Enforcement v. Ryan Aeronautical Co.*, 106 Cal. App. 2d Supp. 833, 236 P.2d 236, 30 A.L.R.2d 347 (1951), an employee, who had worked all but 8 days of a required full year of employment under a

(p. 10) collective bargaining agreement that called for vacation pay after "completion of a year's service", and whose employment was terminated without fault on his part, as a part of employer's reduction of work force for economic reasons, was held, by the application of the doctrine of specific performance, to be entitled to the vacation pay. There the California Appellate Department of Superior Court said, at page 350 A.L.R. 2d:

> "Substantial compliance, it has been said, meets the requirements of *any obligation* and what acts may constitute a compliance sufficient to meet the requirements of the law is a question to be determined on the facts in each individual case." (Emphasis supplied).

The respondent argues vigorously that the doctrine of substantial performance is not, or at least in its view of things should not be, applicable to the case at bar. Respondent has been assiduous and repetitive in espousing the position that only complete and precise compliance with every single facet "between the parties" is necessary before the Respondent can have relief. It goes on at great length about the necessity of institutions of higher learning having academic freedom to preserve their high and lofty goals and the ability to protect the integrity of the degree system and even in turn to thus protect the public from unqualified and unscrupulous graduates going about pandering their deficient knowledge and training. All of that very laudable position is wholly beside the point in this case. Every case cited by the Petitioner in its Petition in support of its position in the case at bar are cases involving questions of academic qualification and/or disciplinary measures or matters

involving breach of an honor code or dishonesty violations of one type or another.

(p. 11) *Slaughter v. Brigham Young University*, 514 F.2d 622 (10th Cir. 1975) was a simple case of academic dishonesty. The issue of how to interpret a "special" or "unique" contract between the school and pupil was not involved. Here Dean Graziano agreed that the "contract" with Sharon was "unique".

Sofair v. State University of N.Y., 54 A.D.2d 287, 388 N.Y.S.2d 453 (1976), as do so many of the cases, deals with an academic failure of a medical student. *Olsson v. Board of Higher Education*, 49 NY 2d 408, 402 NE2d 1150, 426 N.Y. Supp. 2d 248 (1980) falls into the same category of evaluating a student's academic qualifications.

Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976) again deals with academia and not a special or unique contract. *Doherty v. Southern College of Optometry*, 862 F.2d 570 (6th Cir. 1988) is another academic qualification case and does not in any way deal with a special or unique addendum to the usual student-institutional relationship.

Regents of University of Michigan v. Ewing, 474 U.S. 214, 106 S. Ct. 507 (1985) involved a student who was dismissed for failing an important written examination. *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 98 S. Ct. 948 (1978) dealt with a student who had been dismissed for failure to meet academic standards. *Clayton v. Trustees of Princeton University*, 608 F.Supp. 413 (D. N.J. 1985) involved a case of a student cheating on an examination which constituted a breach of a student's honor code."

Lyons v. Salve Regina College, 565 F.2d 200 (1st Cir. 1977) cert. den. 435 U.S. 971 (1978), was similarly a case arising out of a straight academic failure. It centered (p. 12) about the issue whether a three-member "appeals committee" recommendation to change a failing grade was binding on the Dean of the Nursing Department. There the Circuit Court reversed a finding by the District Court that the College had breached its agreement with the student when the Dean rejected the "recommendation". As in so many other cases cited by the Petitioner, the Court was there dealing with an academic failure.

The Trial Justice on three (3) separate occasions dealt with the doctrine and its application to the case at bar. His bench decisions at the conclusion of the Respondent's case; at the end of the Petitioner's case; and his charge to the jury in that regard are set out in Appendix A hereto. He properly applied the doctrine to the instant case.

APPENDIX B

Bench Comments of Trial Justice
Re: Substantial Performance

At the conclusion of the Plaintiff's case he said at page 92 of the transcript for April 11, 1989 (Trial Day #4) (App. Vol. I p. 523a):

> "It is a very important doctrine in the law of the State of Rhode Island. If the jury can say that the Plaintiff substantially performed her contractual obligations to the college, then they can say that she was wrongfully discharged, or dismissed from her course. If the jury on the other hand determines that there was really no substantial performance, viewing the overall picture, including her obligations under this side agreement, then the jury can determine that the college justifiably dismissed her from the program.
>
> Neither side has talked about substantial performance to this point, but I would expect that they would give me some request for instructions at the appropriate time on that subject."

At the end of the defendants' case on April 14, 1989, he said at pages 13, 14 and 15 of the transcript for that day (Trial Day #7) (App. Vol. II p. 820a):

> "THE COURT: I understand the defendant's argument that the doctrine of substantial performance should not apply generally in the academic context, and generally when the issue is whether someone has complied with the code of conduct within a college or whether that person has passed or flunked a course, the doctrine of substantial performance should not apply. However, in this case, I have to determine whether the Supreme Court of Rhode Island if

faced with this case would decide whether the doctrine of substantial performance would apply."

" . . . I am satisfied in my own mind that if the Supreme Court of Rhode Island has this particular case to decide, the Supreme Court of Rhode Island would say that the doctrine of substantial performance should apply, and the jury should make a determination of whether there was substantial performance by the plaintiff in this case. Therefore, the jury must make a determination of whether the dismissal of the plaintiff from the nursing program at the time in question, August 21, 1985, was wrongful or not. In other words, whether it was a breach of the college's obligation, because if the plaintiff substantially performed her agreement, all her agreements with the college, then it was a wrongful act on the part of the college to dismiss her from the nursing program, what she had bargained for. So, since I make this determination as a matter of law that I think the Supreme Court of Rhode Island would apply the doctrine of substantial performance to these facts, I therefore will submit the issue of substantial performance to the jury."

Finally for a third time the District Court gave voice to these principles when he charged the jury on April 14 as follows: (Taken from pages 84 and 85 of the transcript of Trial Day 37) (App. Vol. II, pp. 891a & 892a):

"This case is different in that a special contract came into existence between the parties on December 18, 1984. That contract is in writing, and is Plaintiff's Exhibit Number 38, what's been referred to during this trial as the contract. That was a valid and binding contract between the parties.

Whatever view you take of the evidence, it is clear that Sharon Russell was in danger of receiving an unsatisfactory grade in her clinical course taken that fall, the medical and surgical clinical course, whose teacher was Mary Lavin. Rather than have her get an unsatisfactory in that course, it was determined by both sides that she would receive a satisfactory grade if she made the agreements contained in that written contract. The contract was signed by the plaintiff and obviously agreed to by the college through Dean Graziano, and that became a binding contract as part of the overall contractual relationship between Sharon Russell and Salve Regina College.

It is clear and undisputed that on August 21, 1985, Sharon Russell was dismissed from the nursing program because the college through its agents, Graziano and Chapdelaine, asserted that Sharon Russell had not complied with the terms of the contract.

So bringing this case down to its very simplest terms, in order for the plaintiff to recover in this case, the plaintiff must prove to you by a fair preponderance of the evidence that on August 21, 1985, she was wrongfully dismissed from the nursing program.

In order to prove that she was wrongfully dismissed from the nursing program at the time, she has to prove that she performed her obligation, and all obligations, actually, under the contract that she had, with the college, the whole contract. There is no dispute in this case that she performed adequately academically, and to that point she had a passing grade in everything, had maintained the point average that was required, that she had complied with all the rules and regulations and policies of the college, and therefore, the case comes down to the point

of whether she had complied with this special agreement of December 18, 1984.

The law provides that substantial and not exact performance accompanied by good faith is what is required in a case of a contract of this type. It is not necessary that the plaintiff have fully and completely performed every item specified in the contract between the parties. It is sufficient if there has been substantial performance, not necessarily full performance, so long as the substantial performance was in good faith and in compliance with the contract, except for some minor and relatively unimportant deviation or omission.

Whether there has been substantial performance of a contract in any particular circumstance is a question of fact for you, the jury, to determine."

APPENDIX C

After analyzing the cases cited by the Petitioner in support of its position that the doctrine of substantial performance should not apply to the case at bar, the Circuit Court proceeded to differentiate the instant case from those so cited, and said:

> "The College, the jury found, forced Russell into voluntary withdrawal because she was obese, and for no other reason. Even worse, it did so after admitting her to the College and later the Nursing Department with full knowledge of her weight condition. Under the circumstances, the "unique" position of the College as educator becomes less compelling. As a result, the reasons against applying the substantial performance standard to this aspect of the student-college relationship also become less compelling. Thus, Salve Regina's contention that a court cannot use the substantial performance standard merely because the student has completed 124 out of 128 credits, while correct, is inapposite. The court may step in where, as here, full performance by the student has been hindered by some form of impermissible action."

APPENDIX D

10. See *United States v. Durham Lumber Co.*, 363 U.S. 522, 80 S.Ct. 1282, 4 L.Ed.2d 1371. In *Propper v. Clark*, 337 U.S. 472, 486-487, 69 S.Ct. 1333, 1341-1342, 93 L.Ed. 1480, the Court stated: "The precise issue of state law involved, *i. e.*, whether the temporary receiver under § 977-b of the New York Civil Practice Act is vested with title by virtue of his appointment, is one which has not been decided by the New York courts. Both the District Court and the Court of Appeals faced this question and answered it in the negative. In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions were shown to be unreasonable." In *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 629-630, 66 S.Ct. 445, 451, 90 L.Ed. 358, the Court stated: "Petitioner makes an extended argument to the effect that *Duke Power Co. [v. State Board*, 129 N.J.L. 449, 30 A.2d 416; 131 N.J.L. 275, 36 A.2d 201,] is not a controlling precedent on the local law question on which the decision below turned. On such questions we pay great deference to the views of the judges of those courts 'who are familiar with the intricacies and trends of local law and practice.' *Huddleston v. Dwyer*, 322 U.S. 232, 237, 64 S.Ct. 1015, 1018, 88 L.Ed. 1246. We are unable to say that the District Court and the Circuit Court of Appeals erred in applying to this case the rule of *Duke Power Co. v. State Board*, which involved closely analogous facts." And in *MacGregor v. State Mut. Life Assur. Co.*, 315 U.S. 280, 281, 62 S.Ct. 607, 86 L.Ed. 846, the Court stated: "No decision of the Supreme Court of Michigan, or of any

other court of that State, construing the relevant Michigan law has been brought to our attention. In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan."
